

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

United States of America)	
)	CR. No. 7:07-94-HMH
)	
vs.)	OPINION & ORDER
)	
Nikki Nicole Thomas,)	
)	
Defendant.)	

This matter is before the court on remand from the United States Court of Appeals for the Fourth Circuit. United States v. Thomas, No. 08-4718 at *2 (4th Cir. Oct. 20, 2008) (unpublished). Nikki Nicole Thomas (“Thomas”) is seeking to appeal her conviction and sentence and the Government has moved to dismiss her appeal as untimely.

On October 20, 2008, the Fourth Circuit remanded this case “[b]ecause it is not clear from the record whether Thomas’ appeal was timely noted” and requested that the court make “a factual finding of when Thomas’ notice of appeal was given to prison officials for mailing.” Thomas, No. 08-4718, 2008 WL 4626205, at *1 (4th Cir. Oct. 20, 2008) (unpublished). Further, the Fourth Circuit noted that if the court “finds that the notice of appeal was given to prison officials within the excusable neglect period, the court should also determine whether there was excusable neglect justifying Thomas’ delay in noting an appeal.” Id.

Thomas failed to file her notice of appeal within ten days after the entry of judgment. Id.; Fed. R. App. P. 4(b)(1)(A). Further, Thomas’ notice of appeal was not filed within the thirty-day excusable neglect period. Fed. R. App. P. 4(b)(4). Thomas had until April 3, 2008, to file a timely notice of appeal. The thirty-day excusable neglect period expired thirty days after

April 3, 2008. Pursuant to the mailbox rule, the notice of appeal is deemed filed when it is delivered to prison officials. See Houston v. Lack, 487 U.S. 266, 276 (1988). Although Thomas' letter is undated, the envelope accompanying her letter is postmarked July 8, 2008. Therefore, the only inference that can be drawn is that Thomas delivered her letter to prison officials on or around July 8, 2008. This is well past the expiration of the thirty-day excusable neglect period, which expired in early May 2008. Based on the foregoing, the court finds that Thomas's notice of appeal was untimely filed and her notice of appeal was not filed within the thirty-day excusable neglect period.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
October 23, 2008

NOTICE OF RIGHT TO APPEAL

The Defendant is hereby notified that she has the right to appeal this order within sixty (60) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.